

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

TOMMY GOREE, #97214

PETITIONER

VERSUS

CIVIL ACTION NO. 4:08-cv-146-DPJ-JCS

STATE OF MISSISSIPPI

RESPONDENT

**ORDER OF TRANSFER PURSUANT
TO 28 U.S.C. § 1631**

This matter comes before the Court, *sua sponte*, for consideration of transfer. Petitioner, an inmate of the Mississippi Department of Corrections, currently incarcerated in the Mississippi State Penitentiary, Parchman, Mississippi, filed this request for habeas corpus relief.

Petitioner was convicted of robbery by use of a deadly weapon in the Circuit Court of Lauderdale County on December 22, 1997. As a result, Petitioner was sentenced to serve forty years in the custody of the Mississippi Department of Corrections. Petitioner previously filed for habeas relief in this Court challenging the same conviction and sentence in *Goree v. United States District Court*, civil action number 4:04-cv-113-LN (S.D. Miss. May 16, 2005). On May 16, 2005, Judge Tom S. Lee entered a Final Judgment [12] which dismissed the action, with prejudice.

In the instant case, Petitioner asserts that during his criminal trial his constitutional rights were violated by false testimony and ineffective assistance of counsel. In addition, Petitioner argues that the prosecution lacked sufficient evidence to convict him of robbery. Although Petitioner styles the instant request for relief as a Rule 60(b) motion, he is challenging the legality of his robbery conviction, therefore the Court construes his filing as a request for habeas

corpus relief under 28 U.S.C. § 2254. As explained by the United States Supreme Court in *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), a Rule 60(b) motion in a § 2254 case must be treated as a successive habeas petition if it asserts or reasserts a substantive claim to set aside the petitioner's state conviction. Since Petitioner is attacking the validity of his robbery conviction and he has previously litigated a § 2254 case challenging this same conviction, the Court concludes that the instant cause of action is a successive petition for habeas corpus relief. *See Fierro v. Johnson*, 197 F.3d 147, 151 (5th Cir. 1999) ("Rule 60(b) motions should be construed as successive habeas petitions governed by the AEDPA's provisions"), *see also Ochoa Canales v. Quarterman*, 507 F.3d 884, 887 (5th Cir. 2007).

A Petitioner who is filing a second or successive motion for habeas relief must first apply to the appropriate Court of Appeals for an order authorizing the District Court to consider the successive motion. 28 U.S.C. § 2244(b)(3)(A). Petitioner has failed to submit any documentation demonstrating that he has obtained the required authorization from the United States Court of Appeals for the Fifth Circuit to proceed with his cause in this Court. Therefore, this Court has determined that in the interest of justice, this cause should be transferred to the United States Court of Appeals for the Fifth Circuit for a determination whether this successive or second petition should be allowed. *See In Re Epps*, 127 F.3d 364 (5th Cir. 1997).

Accordingly,

IT IS HEREBY, ORDERED AND ADJUDGED that pursuant to 28 U.S.C. § 1631, this petition for habeas corpus relief is transferred to the United States Court of Appeals for the Fifth Circuit.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk of this Court is directed

to close this case pending the decision of the United States Court of Appeals for the Fifth Circuit.

SO ORDERED AND ADJUDGED this the 13th day of January, 2009.

s/ Daniel P. Jordan III

UNITED STATES DISTRICT JUDGE